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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOHNATHON DALE HANKS,<br><br>Defendant and Appellant. | F075632<br><br>(Super. Ct. No. BF166617A)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. David R. Zulfa, Judge.

Julia J. Spikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen, Jesse Witt, and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Johnathon Dale Hanks assaulted his wife on two different occasions. On each of the two occasions, defendant possessed a firearm. Among his several convictions were two counts of possessing a firearm as a felon in violation of Penal Code section 29800.[1] However, years before the two incidents, defendant had successfully moved to have his underlying "felony" reduced to a misdemeanor. (See § 17, subd. (b).) The Attorney General concedes defendant's trial counsel was prejudicially ineffective for failing to timely and properly challenge the felon-in-possession charges based on the earlier reduction of the underlying felony to a misdemeanor. We accept the concession, reverse the convictions on those two counts, and remand for resentencing.

## BACKGROUND

In an information filed January 10, 2017, the Kern County District Attorney charged defendant with 10 counts. The first three, which allegedly occurred on or about December 9, 2016, were assault by force likely to cause great bodily injury (count 1; § 245, subd. (a)(4)), assault with a firearm (count 2; § 245, subd. (a)(2)) with a personal firearm use enhancement (§ 12022.5, subd. (a)), criminal threats (count 3; § 422) with a personal firearm use enhancement (§ 12022.5, subd. (a)). The remaining seven, which allegedly occurred on or about December 16, 2016, were attempted murder (count 4; §§ 664 & 187, subd. (a)), assault by means likely to cause great bodily injury (count 5; § 245, subd. (a)(4)), corporal injury of a spouse (count 6; § 273.5, subd. (a)); criminal threats (count 7; § 422) with a personal firearm use enhancement (§ 12022.5, subd. (a)), child endangerment (count 8; § 273a, subd. (a)), possession of a firearm (nine-millimeter handgun) as a felon (count 9; § 29800, subd. (a)(1)), and possession of a firearm (shotgun) as a felon (count 10; § 29800, subd. (a)(1)).

A jury acquitted defendant of counts 2, 3, 4, and 7. The jury found defendant not guilty of the offenses charged in counts 1, 5, and 8, but found him guilty of lesser

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[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

included offenses (i.e., simple assaults on counts 1 and 5, and misdemeanor child abuse on count 8). The jury convicted defendant as charged on counts 6, 9, and 10.

The court sentenced defendant to a three-year prison term on count 6, a consecutive eight-month prison term on count 9, and another consecutive eight-month prison term on count 10. The court also sentenced defendant to three 180-day terms in the custody of the sheriff on counts 1, 5, and 8. The sentence on count 5 was stayed pursuant to section 654.

## FACTS

"Because the historical facts underlying the offenses are not relevant to the issues raised on appeal, they are only briefly summarized." (*People v. Vigil* (2008) 169 Cal.App.4th 8, 11, fn. 1.)

On December 9, 2016, defendant's wife Ashly was eight months pregnant. Defendant and Ashly got into an argument, which turned physical when defendant came up behind her, put his arm around her neck, and brought her down with him as he laid onto a couch. Defendant got a handgun, put it to Ashly's head and said he was going to kill her.

On December 16, 2016, defendant and Ashly got into another argument. Eventually, defendant pushed Ashly into the doorframe of a closet. Defendant threw Ashly's items out of the front and back doors of the house. Their three children tried to stop defendant. After some time, defendant went to "mow grass" but eventually returned and choked Ashly twice. The three children were present as defendant choked Ashly. Defendant retrieved a firearm, loaded it, and said he was going to take Ashly out.

## DISCUSSION

### *I. The Convictions on Counts 9 and 10 Must be Reversed for Ineffective Assistance of Counsel*

"To show ineffective assistance, defendant must show that 'counsel's performance

was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.'" (*People v. Woodruff* (2018) 5 Cal.5th 697, 761.)

As noted above, defendant was convicted of two counts of possessing a firearm as a felon, in counts 9 and 10. (§ 29800, subd. (a)(1).) One important element of that crime (as charged here) is that defendant actually had previously "been convicted of … a felony." (See § 29800, subd. (a)(1).) In this case, the "felony" relied on by the prosecution was a 2005 conviction for violating Vehicle Code section 23153 (driving under the influence and causing bodily injury). However, in 2013, defendant filed a motion in superior court to reduce the felony driving under the influence conviction to a misdemeanor under section 17, subdivision (b), which the court granted.[2] The Attorney General concedes that the reduction of the felony to a misdemeanor precludes its use as the underlying "felony" for a subsequent felon-in-possession charge under section 29800. (See *Culbert, supra,* 218 Cal.App.4th at p. 194.) In supplemental briefing, the Attorney General further concedes that trial counsel's failure to timely and properly challenge[3]

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[2] The court also *dismissed* the conviction (and an assault with a deadly weapon conviction) because defendant had fulfilled the conditions of his probation. (See § 1203.4.) However, a dismissal under section 1203.4 does not preclude the dismissed conviction from later being used to support a felon-in-possession charge. (See § 1203.4, subd. (a)(2).) Consequently, if all the court had done in 2013 was to dismiss the prior conviction under section 1203.4, defendant would not prevail today. However, as noted above, the court also reduced the conviction from a felony to a misdemeanor pursuant to section 17. Unlike the dismissal under section 1203.4, reducing the conviction to a misdemeanor under section 17 *does* preclude its subsequent use to support a felon-in-possession charge. (See *People v. Culbert* (2013) 218 Cal.App.4th 184, 194.)

[3] Defendant, who was represented by counsel, waived his right to a preliminary hearing. As a result, the magistrate found that, "*pursuant to stipulation of counsel* and based upon the offense report," there was "sufficient cause" to hold defendant to answer on all counts, including 9 and 10. (Unnecessary capitalization removed, italics added.) Given the reduction of the underlying felony to a misdemeanor, counsel should not have waived the preliminary hearing and should have instead sought a magistrate finding that there was insufficient evidence to hold defendant to answer on counts 9 and 10. This also

counts 9 and 10 on this ground constituted prejudicial ineffective assistance of counsel. We accept this concession (see *ibid.*), and reverse the convictions on counts 9 and 10.[4]

**DISPOSITION**

Defendant's convictions on counts 9 and 10 are reversed. The matter is remanded for resentencing.

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SMITH, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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MEEHAN, J.

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would have preserved defendant's ability to later move to set aside the information pursuant to section 995.

Defense counsel must have discovered the issue months later because he then filed a "non-statutory" motion to dismiss counts 9 and 10, on the grounds the underlying felony had been reduced to a misdemeanor. The superior court denied the motion – a ruling both parties concede was erroneous. (See *Culbert*, *supra*, 218 Cal.App.4th at p. 194.)

[4] Because this disposition is based on ineffective assistance of counsel, the clerk of this court is directed to give the required notice to the State Bar pursuant to Business and Professions Code section 6086.7 and to Hanks's trial counsel pursuant to California Rules of Court, rule 10.1017, upon issuance of the remittitur. (See *In re Jones* (1996) 13 Cal.4th 552, 589, fn. 9; *In re Sixto* (1989) 48 Cal.3d 1247, 1265, fn. 3; *People v. Pangan* (2013) 213 Cal.App.4th 574, 584, fn. 10.)